

GAO

United States General Accounting Office

Testimony

Before the Subcommittee on Commercial and
Administrative Law, Committee on the Judiciary, House of
Representatives

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Statement of Robert P. Murphy, General Counsel



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Chairman Gekas, Mr. Nadler, and Members of the Committee:

I am pleased to appear before you today to discuss the General Accounting Office's responsibilities in the congressional review of agency rulemakings under the Small Business Regulatory Enforcement Fairness Act (SBREFA), and our experience in the 11 months since the statute was enacted.

Congressional oversight of rulemaking as contemplated by SBREFA can be an important and useful tool for balancing and accommodating the concerns of American citizens and businesses with federal agency rulemaking. It is important to assure that Executive branch agencies are responsive to citizens and businesses about the reach, cost, and impact of regulations without compromising the statutory mission given to those agencies. SBREFA seeks to accomplish this by giving the Congress an opportunity to review rules before they take effect and to disapprove those found to be too burdensome, excessive, inappropriate, duplicative, or otherwise objectionable.

Under SBREFA, before a rule can take effect, the federal agency must submit the rule to both Houses of Congress and the GAO. GAO's primary role in this new mechanism is to provide the Congress with a quick review of all "major" rules submitted to determine if the promulgating agencies have complied with the procedural steps governing the regulatory process. For rules that are determined to be "major," GAO must provide its report to the congressional committees of jurisdiction within 15 calendar days.

Major Rules

SBREFA defines a "major" rule as one which has resulted in or is likely to result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, government agencies or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of U.S.-based enterprises to compete with foreign-based enterprise in domestic and export markets. SBREFA specifies that the determination of what rules are "major" is to be made by the Office of Information and Regulatory Affairs, Office of Management and Budget. These rules cannot be effective until 60 days after publication in the Federal Register or submission to Congress and GAO, whichever is later.

GAO is required to submit a report to the committees of jurisdiction by the end of 15 calendar days containing GAO's assessment of the federal

agency's "compliance with the procedural steps" required by the various acts and executive orders bearing on the regulatory process enumerated in SBREFA. These include the preparation of a cost-benefit analysis, where required, and compliance with the Regulatory Flexibility Act, the Unfunded Mandates Reform Act of 1995, the Administrative Procedure Act, the Paperwork Reduction Act, and Executive Order No. 12866. Other acts and executive orders which have been considered by federal agencies in major rules submitted to GAO include executive orders about family considerations, federalism, protected property rights, intergovernmental partnership and civil justice, and the National Environmental Policy Act.

Our reviews are based on the information given to us by the promulgating federal agency and any additional information we obtain during the 15-day report preparation period. Because of the time constraints imposed by SBREFA, GAO's role is necessarily limited to a paper review of the processes employed in the rulemaking under applicable statutory and regulatory mandates. For example, in the area of cost-benefit analysis, we assure that the federal agency has conducted some type of analysis, whether it is called a cost-benefit analysis, economic impact analysis, or economic analysis, and whether the analysis contains the three elements of a cost-benefit analysis required under Executive Order No. 12866. These are (1) an assessment of the costs and benefits, including the underlying analysis, anticipated from the regulatory action, (2) the costs and benefits, including the underlying analysis, of reasonably feasible alternatives considered, and (3) why the planned regulatory action is preferable.

Also, we provide a copy of each major rule to the audit or evaluation group within GAO that would be most interested to ascertain if GAO has performed any work relevant to the rule which should be brought to the attention of the Congress.

From the March 29, 1996, enactment of SBREFA through February 28, 1997, GAO has received 58 major rules from federal agencies, and all of our reports on these rules have been submitted by the statutory deadline.

Our major rule reports are available on the Internet within 24 hours of transmittal to the committees of jurisdiction. In a recent week, our major rule reports on the Internet were accessed 938 times and reports were downloaded 273 times. In addition, the reports will be included in the GAO Monthly List of Publications beginning next month, at which time paper copies will be available through our document distribution system.

It has been our experience that, with few exceptions, federal agencies have sought to comply with the requirements of SBREFA, and, for the most part, they have been successful.

On some occasions, where federal agencies failed to comply with SBREFA, when we brought the matter to the attention of agency officials, corrective action was taken. For example, the Environmental Protection Agency stated that its rule on the Nitrogen Oxide Emission Reduction Program would become effective upon publication in the Federal Register rather than after the 60-day delay required by the statute. When this was brought to the attention of EPA, it published a correction in the Federal Register and delayed the effective date the required 60 days. Similarly, when we pointed out to the Department of Housing and Urban Development (HUD) that certain disclosure requirements should have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act, HUD began steps to publish a correction to the final rule and submit the matter for OMB approval.

One difficulty we have noted on a few occasions is the apparent failure of some federal agencies to budget enough time into the regulatory process to allow for the 60-day delay in the effective date of a major rule. The Department of Health and Human Services, Health Care Financing Administration did not allow for the 60-day delay when issuing "Revisions to Payment Policies and Five Year Review of and Adjustments to the Relative Value Units under the Physician Fee Schedule for the Medicare Program," citing the "good cause" exception found at 5 U.S.C. § 808(2) because Congress was not in session during most of the 60-day period and the effective date was established by the Medicare statute. We noted in our report to Congress that the "good cause" exception is only available for rules that do not involve notice and public comment procedures (those procedures normally followed in rulemaking) and since HCFA had issued a notice of proposed rulemaking and received public comments, the effective date could not be accelerated.

The Department of Agriculture, Rural Housing Service argued that the 60-day delay in the effective date of a rule entitled "Reengineering and Reinvention of the Direct Section 502 and 504 Single Family Housing Program" would result in a loss of the savings the rule would produce and be contrary to the public interest. As with the Medicare payment revisions, the rule had been previously issued as a notice of proposed rulemaking and the section 808(2) "good cause" exception could not be invoked.

Most recently, HUD in issuing a regulation entitled "Sale of HUD-Held Single Family Mortgages" allowed for a 60-day delay in the effective date from the date of publication in the Federal Register, January 24, 1997. Since HUD did not file its report on the rule with Congress until February 6, 1997, the rule was not delayed the required 60 days.

In addition to the major rule reports, GAO responded on September 16, 1996, to a request from the Chairman of the Subcommittee on Forests and Public Land Management, Senate Committee on Energy and Resources, addressing whether a memorandum issued by the Secretary of Agriculture in connection with the Emergency Salvage Timber Sale Program constituted a "rule" under SBREFA and should have been submitted to the Houses of Congress and GAO before it could become effective. We concluded that the Department of Agriculture erred in believing that the memorandum was not a rule.

Nonmajor Rules

SBREFA requires that agencies file with GAO and both Houses of Congress copies of all rules, not just "major" rules. To date, we have received 3,609 nonmajor rules. Although the law is silent as to GAO's role relating to the nonmajor rules, we have established a database that would give minimal information about the 15 rules we receive on the average each day. Our database captures the title, the agency, the Regulation Identification Number, the type of rule, the proposed effective date, date published in the Federal Register, the congressional review trigger date, and any joint resolutions of disapproval that may be enacted. We are working on a system that would allow us to post the information currently contained in our database on the Internet.

An expansion of this database could make it more useful, not only to GAO for use in its oversight work, but to the Congress and to the public. We have been working with executive agencies to get more substantive information about the rules. Attached to this testimony is a copy of a questionnaire designed to obtain the basic information about each rule required by SBREFA (5 U.S.C. § 801(a)(1)(B)). This questionnaire asks the agencies to report on such items as (1) whether the agency provided an opportunity for public participation, (2) whether the agency prepared a cost-benefit analysis or a risk assessment, (3) whether the rule was reviewed under executive orders for federalism or takings implications, and (4) whether the rule was economically significant.

In developing this questionnaire we consulted with Executive branch officials to insure that the requested information would not be unnecessarily burdensome. We circulated the questionnaire for comment to 20 agency officials with substantial involvement in the regulatory process, including, of course, officials from the Office of Information and Regulatory Affairs. The Administrator of OIRA submitted a response in her capacity as Chair of the Regulatory Working Group, consolidating comments from all the agencies represented in that group. It is the position of the group that the completion of this questionnaire for each of the 4,000 to 5,000 rules we expect to be filed each year is too burdensome for the agencies concerned. The group points out that the majority of rules submitted each year are routine or administrative or are very narrowly focused regional, site-specific, or highly technical rules.

We continue to believe that it would further the purposes of SBREFA for a database of all rules submitted to GAO to be available for review by Members of Congress and the public. We will continue our efforts to obtain agreement of the Executive branch on this matter.

If the Internet database is to be of optimal use to interest groups or the general public, it should direct the public to the congressional committees of jurisdiction so comments about pending rules can be forwarded to the legislators most able to address them. Ascertaining the committees of jurisdiction for the nonmajor rules has been difficult because of the sheer number of rules submitted and the lack of consistency in which the rules are cited in the Congressional Record. We have initiated discussions with the House Parliamentarian to more efficiently obtain this information electronically. We hope at some point to tie GAO's database to that used by the Parliamentarian, so that one comprehensive body of information is available concerning regulations. We plan to initiate similar discussions with the Senate Parliamentarian.

Thank you, Mr. Chairman. This concludes my prepared remarks. I would be happy to answer any questions you may have.

United States General Accounting Office

GAO

Federal Rule Questionnaire

Please fill the circles completely with black pen or #2 pencil.

1. Name of Department or Agency		2. Subdivision or Office	
3. Rule Title		4. Rule Identification Number (RIN) or other unique identifier	
5. Major Rule <input type="radio"/>	Non-major Rule <input type="radio"/>	6. Final Rule <input type="radio"/>	Interim Rule <input type="radio"/>
Other <input type="radio"/>		Other <input type="radio"/>	
7. Priority of Regulation		Economically Significant <input type="radio"/>	
Routine and Frequent <input type="radio"/>		Informational/Administrative/Other <input type="radio"/>	
8. Effective Date		9. Termination date, if any	
10. Concise summary of rule		attached <input type="radio"/> stated in rule only <input type="radio"/>	

	Yes	No	N/A
A. With respect to this rule, did your agency provide an opportunity for public participation (i.e., notice and comment) in the rulemaking process under the Administrative Procedure Act or agency-specific procedures?	<input type="radio"/>	<input type="radio"/>	
B. With respect to this rule, did your agency prepare a cost-benefit analysis (any document that your agency considers a cost-benefit analysis regardless of its title)?	<input type="radio"/>	<input type="radio"/>	
C. With respect to this rule, did your agency prepare a risk assessment? If yes, are you submitting the risk assessment to GAO?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
D. With respect to this rule, was your agency required to publish a general notice of proposed rulemaking under the Administrative Procedure Act or other law?	<input type="radio"/>	<input type="radio"/>	
E. With respect to this rule, did your agency			
1. certify that the rule would not have a significant economic impact on a substantial number of small entities under 5 U.S.C. § 605(b)?	<input type="radio"/>	<input type="radio"/>	
2. prepare an initial Regulatory Flexibility Analysis under 5 U.S.C. § 603(a)?	<input type="radio"/>	<input type="radio"/>	
3. convene a review panel under 5 U.S.C. § 609(b)?	<input type="radio"/>	<input type="radio"/>	
4. prepare a final Regulatory Flexibility Analysis under 5 U.S.C. § 604(a)?	<input type="radio"/>	<input type="radio"/>	

OPE: OGC

GAO Form 416 (11/96)

	Yes	No	N/A
F. With respect to this rule, did your agency publish a small entity compliance guide under § 212 of Public Law 104-121?	<input type="radio"/>	<input type="radio"/>	
G. With respect to this rule, did your agency			
1. prepare a statement including an assessment of costs and benefits and other information under § 202 of the Unfunded Mandates Reform Act of 1995?	<input type="radio"/>	<input type="radio"/>	
2. consult with small governments in accordance with a plan consistent with § 203 of the Unfunded Mandates Reform Act of 1995?	<input type="radio"/>	<input type="radio"/>	
3. consult with State, Local or Tribal governments under a process described in § 204 of the Unfunded Mandates Reform Act of 1995?	<input type="radio"/>	<input type="radio"/>	
4. consider the regulatory alternatives under § 205 of the Unfunded Mandates Reform Act of 1995?	<input type="radio"/>	<input type="radio"/>	
H. With respect to this rule, did your agency			
1. prepare an environmental assessment under the National Environmental Policy Act (NEPA) or any other Act?	<input type="radio"/>	<input type="radio"/>	
2. prepare an environmental impact statement under NEPA or any other Act?	<input type="radio"/>	<input type="radio"/>	
I. Does the rule contain a collection of information requiring OMB approval and a control number under the Paperwork Reduction Act of 1995?	<input type="radio"/>	<input type="radio"/>	
If yes, did your agency obtain or is it now obtaining OMB approval and a control number?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
J. Did your agency assess the rule for family implications as called for by E.O. 12606?	<input type="radio"/>	<input type="radio"/>	
If yes, did your agency determine that the rule may have a significant potential negative impact on family well-being?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
If yes, did your agency prepare the written certification required by section 2 of the Order?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
K. Did your agency assess the rule for federalism implications as called for under E.O. 12612?	<input type="radio"/>	<input type="radio"/>	
If yes, did your agency submit the Federalism Assessment to OMB?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
L. Did your agency assess the rule for takings implications as called for in E.O. 12630?	<input type="radio"/>	<input type="radio"/>	
If yes, did your agency identify and discuss the rule's takings implications in the notice of proposed rulemaking?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
M. Was the rule reviewed under E.O. 12866?	<input type="radio"/>	<input type="radio"/>	
If yes, was the rule considered economically significant?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
N. Did your agency review the rule under E.O. 12988?	<input type="radio"/>	<input type="radio"/>	

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